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LIM BOON KIAK

v.

AFFIN BANK BHD

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: J-03(IM)-163-10-2012]

C

22 FEBRUARY 2013

BANKRUPTCY: *Creditor's petition - Setting aside - Service of - Creditor's petition served on appellant's solicitors - Whether solicitors had authority to accept service of documents - Whether mandatory for*

D

creditor's petition to be served personally on judgment debtor - Failure to comply with rr. 109 & 110 Bankruptcy Rules 1969 - Whether fatal or mere irregularity

CIVIL PROCEDURE: *Judgments and orders - Judgment in default - Setting aside - Application for - Whether there were merits in application*

E

to set aside

The appellant filed an application before the Deputy Registrar to set aside the service of the creditor's petition and the adjudication order and receiving order ('AORO') granted against him. However,

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his application was dismissed by the Deputy Registrar. The appellant then filed an appeal before the Judicial Commissioner against the said decision, which was also dismissed. Thus, the appellant filed this present appeal in the Court of Appeal. The issues raised to support the appellant's appeal were (i) that the

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service of the creditor's petition was not effected personally on the appellant (as the judgment debtor) but was served on the solicitors in contravention of r. 109 of the Bankruptcy Rules 1969; and (ii) that the judgment in default was not a final judgment on the ground that an application to set aside the said judgment was

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filed at the Sessions Court within time and the application was still pending. The respondent, on the other hand, contended that the service was regular in law despite the fact that the creditor's petition was only served by post on the appellant's solicitors Tetuan Tan Hee Soon & Co but not personally on the appellant.

I

The respondent further claimed that the appellant only filed his application to set aside the service of the creditor's petition after the AORO was granted against him.

Held (allowing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) Bankruptcy proceedings have a serious penal effect on a judgment debtor. He might be adjudged a bankrupt and his personal liberties might be at stake until his bankruptcy has been discharged. Therefore, the process and procedure in the proceedings must comply with the relevant provisions of the bankruptcy rules; including on the issue of service of the relevant cause papers on the judgment debtor. Rule 109 of the Bankruptcy Rules 1969 makes it mandatory for the creditor's petition to be served personally on the judgment debtor. The sealed copy of the petition must be delivered personally on the debtor. The creditor's petition could not be served by any other means. (paras 9 & 12)

(2) Unless there was a clear indication (in writing) that a firm of solicitors had the authority to accept service of the documents on behalf of the judgment debtor, it could not be served on a firm of solicitors. Herein, the affidavit of service by the respondent deposed that the said creditor's petition was served on the appellant's solicitor. However, there was no indication to show that the said solicitor had the authority to accept service of the creditor's petition on behalf of the judgment debtor. Hence, the said service of the creditor's petition on the judgment debtor was bad for failure to comply with the relevant rules *ie*, r. 109 and r. 110 of the Bankruptcy Rules 1969. It was fatal to the respondent's case and was not a mere irregularity which could be cured. (paras 12, 13 & 16)

(3) Before a judgment debtor could exercise his right to object or to challenge the creditor's petition within the time stipulated, the creditor's petition must first have been served effectively on him. If the service is bad, the issue of raising any objection on the petition would not arise. Failure to serve the petition personally on the judgment debtor would cause substantial injustice to him. He would not be able to exercise his right to object or to challenge the petition within the stipulated time, more so, as in the present case, where the judgment debt was obtained by way of a judgment in default. (para 17)

(4) The appellant did not know of the judgment in default obtained by the respondent. After knowing about it, the appellant had filed an application at the Sessions Court to set aside the said judgment in default. Besides the notice of

A demand on the amount claimed from the respondent's solicitors, the appellant did not receive any writ and statement of claim on the said sum issued by the Sessions Court. The appellant thus had merit in his application to set aside the judgment in default on which the respondent based its B bankruptcy notice and the creditor's petition. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memfailkan permohonan kepada Timbalan Pendaftar untuk mengenepikan penyerahan petisyen pemiutang dan perintah C penghakiman dan penerimaan ('AORO') terhadapnya. Walau bagaimanapun, permohonannya ditolak. Perayu kemudiannya memfailkan rayuan kepada Pesuruhjaya Kehakiman terhadap keputusan tersebut, yang juga ditolak. Oleh itu, perayu memfailkan rayuan ini kepada Mahkamah Rayuan. Isu-isu yang timbul untuk D menyokong rayuan perayu adalah (i) penyerahan petisyen pemiutang tidak dilaksanakan secara kediri kepada perayu (sebagai penghutang penghakiman) tetapi telah diserahkan ke atas peguam-peguamnya dengan melanggar k. 109 Kaedah-Kaedah Kebankrapan 1969; dan (ii) penghakiman ingkar bukan penghakiman muktamad E atas alasan bahawa permohonan untuk mengenepikan penghakiman tersebut telah difailkan di Mahkamah Sesyen dalam tempoh masa yang dibenarkan dan permohonan tersebut masih belum selesai. Responden, walau bagaimanapun, menghujahkan bahawa penyerahan adalah teratur dari segi undang-undang walaupun petisyen F pemiutang itu diserahkan melalui pos kepada peguamcara perayu, Tetuan Tan Hee Soon & Co tetapi bukan secara kediri ke atas perayu. Responden juga mendakwa bahawa perayu hanya memfailkan permohonannya untuk mengenepikan serahan petisyen pemiutang selepas AORO dibenarkan terhadapnya. G

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Prosiding kebankrapan mempunyai kesan yang serius ke atas H penghutang penghakiman. Dia mungkin dihukum sebagai seorang yang muflis dan kebebasan peribadinya mungkin menghadapi risiko sehingga kebankrapan dilepaskan. Oleh itu, proses dan prosedur dalam prosiding harus mematuhi peruntukan-peruntukan relevan kaedah-kaedah kebankrapan; I termasuk isu penyerahan kertas-kertas kausa yang berkenaan ke atas penghutang penghakiman. Kaedah 109 Kaedah-Kaedah Kebankrapan 1969 mewajibkan petisyen pemiutang

diserahkan secara kediri kepada penghutang penghakiman. Salinan petisyen yang dimeterai harus diserahkan secara kediri kepada penghutang. Petisyen pemiutang tidak boleh diserahkan melalui mana-mana cara yang lain. (perenggan 9 & 12)

(2) Melainkan jika terdapat petunjuk yang jelas (dalam tulisan) bahawa sebuah firma peguam mempunyai kuasa untuk menerima serahan dokumen-dokumen bagi pihak penghutang penghakiman, ia tidak boleh diserahkan kepada firma peguam. Di sini, afidavit penyampaian responden menyatakan bahawa petisyen pemiutang telah diserahkan kepada peguam perayu. Tetapi, tiada petunjuk yang menunjukkan peguam tersebut mempunyai kuasa untuk menerima penyerahan petisyen pemiutang bagi pihak penghutang penghakiman. Oleh itu, penyerahan petisyen pemiutang tersebut ke atas penghutang penghakiman adalah tidak sah atas kegagalan mematuhi kaedah-kaedah relevan iaitu k. 109 dan k. 110 Kaedah-Kaedah Kebankrapan 1969. Ia telah menjejaskan kes responden dan bukanlah ketidakaturan semata-mata yang boleh dipulihkan. (perenggan 12, 13 & 16)

(3) Sebelum penghutang penghakiman boleh melaksanakan haknya untuk membantah atau mencabar petisyen pemiutang dalam masa yang ditetapkan, petisyen pemiutang harus diserahkan dengan berkesan ke atasnya. Jika penyerahan adalah tidak sah (seperti di dalam kes ini) isu membangkitkan bantahan ke atas petisyen tidak timbul. Kegagalan menyerahkan petisyen secara kediri ke atas penghutang penghakiman akan menyebabkan ketidakadilan yang substansial. Dia tidak dapat melaksanakan haknya untuk membantah atau mencabar petisyen dalam masa yang ditetapkan, lebih-lebih lagi, dalam kes ini, di mana hutang penghakiman diperolehi melalui penghakiman ingkar. (perenggan 17)

(4) Perayu tiada pengetahuan mengenai penghakiman ingkar yang diperolehi oleh responden. Selepas mengetahui mengenainya, perayu telah memfailkan permohonan di Mahkamah Sesyen untuk mengenepikan penghakiman ingkar tersebut. Selain daripada notis tuntutan berkenaan jumlah yang dituntut oleh peguam-peguam responden, perayu tidak menerima writ atau penyata tuntutan berkenaan jumlah tersebut yang dikeluarkan oleh Mahkamah Sesyen. Perayu oleh itu mempunyai merit dalam permohonannya untuk mengenepikan penghakiman ingkar di mana responden berdasarkan notis kebankrapan dan petisyen pemiutangnya. (perenggan 18)

Legislation referred to:
Bankruptcy Rules 1969, rr. 109, 110, 117

For the appellant - Wong Kai Fen; M/s Tan Hee Soon, Wong & Partners
For the respondent - Mohd Fairuz Mahmood; M/s Mohd Akhir & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JCA:

[1] The appeal before us is against the decision of the learned Judicial Commissioner (dated 12 September 2012) dismissing the appellant's appeal against the decision of the learned Deputy Registrar (dated 26 June 2012) where the learned Deputy Registrar had dismissed his application to set aside the service of the creditor's petition and granted the adjudication order and receiving order (AORO) dated 15 September 2011 against him.

Brief Facts

[2] The respondent, Affin Bank Berhad had on 30 September 2009 obtained a judgment-in-default against the appellant. A bankruptcy notice was filed against the appellant on 29 April 2010 and was served on him by way of substituted service. Subsequently, a creditor's petition was filed on 12 November 2010; and an affidavit of service was affirmed on 25 March 2011.

[3] In respect of the judgment-in-default, the appellant had filed an application to set aside the said judgment at the Sessions Court. The said application is still pending.

[4] In respect of the creditor's petition, the appellant had filed an application before the learned Deputy Registrar (*vide* encl. 20) to stay the execution of the said judgment-in-default. On 15 September 2011, the learned Deputy Registrar dismissed the stay application and proceeded to grant the AORO against the appellant.

[5] On 14 November 2011, the appellant filed an application to set aside the service of the creditor's petition and the AORO before the learned Deputy Registrar. However his application was dismissed by the learned Deputy Registrar. The appellant then filed an appeal before the learned Judicial Commissioner in

chambers against the said decision of the learned Deputy Registrar. Again, the appeal was dismissed by the learned Judicial Commissioner. Then the appellant filed an appeal to the Court of Appeal against the decision of the learned Judicial Commissioner. Hence the present appeal before us.

At the Court of Appeal

[6] Before us, learned counsel for the appellant raised two issues to support his appeal – namely:

(a) that the service of the creditor's petition was not effected personally on the appellant (as the judgment debtor) but was served on the solicitors in contravention of r. 109 of the Bankruptcy Rules 1969; and

(b) that the judgment-in-default was not a final judgment on the ground that an application to set aside the said judgment was filed at the Sessions Court within time and the application is still pending.

On these two grounds the appellant submitted that the service of the creditor's petition and the AORO must be set aside.

[7] The respondent on the other hand contended that the service was regular in law despite the fact that the creditor's petition was only served by post to Tetuan Tan Hee Soon & Co on 23 March 2011 but not personally on the appellant. The respondent submitted that the appellant knew about the petition and had not raised any objection on the issue of service. The respondent further claimed that the appellant only filed his application to set aside the service of the creditor's petition (on 14 November 2011) after the AORO was granted against him on 15 September 2011.

[8] The learned Judicial Commissioner in dismissing the appellant's application ruled that the failure in complying with r. 109 of the Bankruptcy Rules 1969, by not serving the creditor's petition personally on the appellant was just a mere irregularity as the appellant had not raised any objection earlier; and the objection was only raised after the AORO was granted. It was further indicated by the learned Judicial Commissioner that the appellant was not prejudiced and the AORO granted was regular in law.

A **Our Findings**

[9] Bankruptcy proceedings have a serious penal effect on a judgment debtor. He may be adjudged a bankrupt and his personal liberties may be at stake until his bankruptcy is B discharged. Therefore the process and procedure in the proceedings must comply with the relevant provisions of the bankruptcy rules; including on the issue of service of the relevant cause papers on the judgment debtor.

C **[10]** Rule 109 of the Bankruptcy Rules 1969 provides as follows:

> **109 Personal Service.**
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> A creditor's petition shall be personally served and the service shall be affected by an officer of the court or by the creditor or his solicitor or a person in their employment D by delivering a sealed copy of the petition to the debtor.

[11] Rule 110 of the same Rules, provides for service of the petition by way of substituted service. It reads:

E **110 Substituted service.**

(1) If the court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it F may order substituted service to be effected in such manner as it thinks fit.

(2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

G **[12]** Rule 109 makes it mandatory for the creditor's petition to be served personally (kediri) on the judgment debtor. The sealed copy of the petition must be delivered personally to the debtor. In the event that prompt personal service cannot be effected, after attempts have been made, the only avenue left is to apply H for substituted service as provided for under r. 110. Substituted service can only be effected with leave of the court. With the clear provisions of the above rules, it is our view that the creditor's petition against a judgment debtor cannot be served by any other means. It cannot be served on a firm of solicitors, unless there is I a clear indication (in writing) that the said firm of solicitors has the authority to accept service of the documents on behalf of the judgment debtor.

[13] In the present case, the affidavit of service by the respondent deposes that the said creditor's petition was served on "Peguamcara defendan iaitu Tetuan Tan Hee Soon & Co (peguambela dan peguamcara) di alamat No. 14-2 (2nd Floor) Jalan Harimau Taman Century Garden, 80250 Johor Bahru, Johor." There is no indication to show that the said solicitor has the authority to accept service of the creditor's petition on behalf of the judgment debtor. Learned counsel for the respondent on being queried by the court could not produce any form of 'authority' authorising the said solicitors to accept service of the petition on behalf of the judgment debtor.

[14] The process server in her affidavit of service states that:

> Saya telah dimaklumkan oleh Plaintif bahawa Defendan di atas masih tinggal di alamat B10, Kg Baru Ban Foo, 81800 Ulu Tiram, Johor dan/atau No. GM11, Lot 1356, Mukim Sungai Terap, 84000 Muar, Johor seperti mana alamat di dalam surat Perjanjian Pinjaman. Defendan juga telah tidak memaklumkan kepada pihak Plaintif sebarang pertukaran alamat yang baru. Oleh itu, saya percaya bahawa alamat tersebut adalah alamat terakhir Defendan.

[15] The averment by the process server clearly shows that she knew that the judgment debtor was staying at the given address (as stated in the relevant loan agreement) and believed that the said given address was the last known address of the judgment debtor. But, there is no indication to show that any attempt had been made to effect service personally on the judgment debtor at the said address. The appellant complained that the petition was not served personally on him and he had never authorised the solicitors Tetuan Tan Hee Soon & Co to accept service of the petition on his behalf.

[16] In the premise, we are of the view that the said service of the creditor's petition on the judgment debtor was bad for failure to comply with the relevant rules ie, r. 109 and r. 110 of the Bankruptcy Rules 1969. It is fatal to the respondent's case. It is not a mere irregularity which can be cured.

[17] The respondent argued that the appellant cannot raise any objection on the service of the creditor's petition on the ground that any objection must be made within the stipulated time in accordance with r. 117 of the Bankruptcy of Rules 1969. This argument in our view does not hold water at all. Our view is that before a judgment debtor can exercise his right to object or to

challenge the creditor's petition within the time stipulated the creditor's petition must first have been served effectively on him as provided for under r. 109 or r. 110. If the service is bad (as in the present case) the issue of raising any objection on the petition does not arise. A judgment debtor cannot be faulted for failure to raise objection within the stipulated time if the service of the creditor's petition is irregular and bad in law. Failure to serve the petition personally on the judgment debtor will cause substantial injustice to him. He will not be able to exercise his right to object or to challenge the petition within the stipulated time, more so, as in the present case where the judgment debt was obtained by way of a judgment-in-default.

[18] The appellant claimed that he did not know about the judgment-in-default (which was obtained by the respondent on 30 September 2009). After knowing about it the appellant had filed an application at the Sessions Court Johor Bahru to set aside the said judgment-in-default. The appellant also claimed that beside the notice of demand on the amount claimed from the respondent's solicitors, he did not receive any writ and statement of claim on the said sum issued by the Sessions Court. He also claimed that he has merit in his application to set aside the judgment-in-default and that the respondent's claim against him was time barred. On this issue, we agree that the appellant has merit in his application to set aside the judgment-in-default on which the respondent based its bankruptcy notice and the creditor's petition.

Conclusion

[19] Based on the above consideration, we allow the appeal with costs of RM5,000 to the appellant. We set aside the order of the High Court. Consequently, we allow the appellant's application to set aside the creditor's petition as well as the AORO dated 15 September 2011. We also make an order that the deposit be refunded to the appellant.